IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

PHELPS DODGE CORPORATION, A CORPORATION,

Plaintiff in Error—Appellant,

v.

PIFANIO GUERRERO,

Defendant in Error—Respondent.

No. 3591.

UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF FACTS.

This action was brought in the United States District ourt for the District of Arizona, under the provisions f Chap. 6, Title 14, Revised Statutes of Arizona, Civil ode, 1913, known as the "Employers' Liability Law," to ecover damages for injuries to the eyes of plaintiff, sus-ained while in the employ of defendant in one of its ines, and which action resulted in a judgment in favor f plaintiff for $2,750.00 and $43.05 costs, and from this udgment this appeal is prosecuted.

The appeal is taken on questions of privileged communications between patient and physician, and the refusal of the court to give a cautionary instruction requested by defendant.

Appellant has several assignments of error on privileged communication, all of which are restatements of but one assigned error, except an assignment of error on the refusal of the court to give a requested special cautionary charge on privileged communication.

As all of the assigned errors are but a restatement of the first, except the special charge requested by appellant, they may for the sake of brevity be treated as but one assignment.

It is also claimed that the court should not have passed on the question of privileged communication, but should have submitted that matter to the jury to say whether or not the relation of patient and physician existed.

All questions on this appeal arise under the provisions of subdivision 6 of paragraph 1677, Revised Statutes of Arizona, Civil Code, 1913, is as follows:

> (6) "A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The testimony plainly shows that the doctors, Rice, Gray, Detweiler and Stark, were employed by defendant corporation, but in the treatment of plaintiff's eye they were also his physicians, and that the relation of physician and patient existed between those doctors and the plaintiff.

In the course of the trial, several times the court was necessarily called upon to pass on the question whether or not the relation of patient and physician existed between those doctors and the plaintiff, and on each occasion the court held that such relation did exist and refused to permit the doctors called by defendant to testify as to what

they found by examination and treatment of plaintiff's eye.

Appellant contends that the court erred in such rulings, and that it ought to have submitted such questions to the jury to pass on—let in all offered testimony, and at the close of the trial submit a special interrogatory to the jury as to whether or not such relation existed, under a special instruction. If the lower court had done what the appellant wanted it to do, the statute on privileged communications would have been wiped out and rendered a dead letter.

On direct examination the plaintiff testified:

> "The doctor treated me at that time. I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of water that was too strong in my eye, or something, and from there they sent me to Phoenix." (Transcript p. 43.)
>
> "I used to go over to the doctor at Morenci and put some drops in my eye; that was all he did. He didn't give me any treatment." (Transcript p. 44.)

From these statements it is contended that plaintiff has waived the privilege and the doctors are at liberty to testify to privileged matters.

The question what constitutes a waiver has many times been considered by the courts and many diverging views have been announced. Some cases hold that if plaintiff testifies as to his injuries or sets them up in his pleadings or states that a named doctor treated him or states for what ailment he was treated, then, in either instance, the privilege has been waived. It will be noticed that such decisions were not made under a statute the same as Arizona, but are founded more on the common law principles of evidence than upon any particular statutory regulation. Most statutes on the question do not state what does constitute a waiver, and for that reason the courts seek enlightenment from the general rules of evidence, as shown in the case of *Burgess v. Sims Drug Co.*, 114 Iowa 275, 86 N. W. 309, second column, where the court said:

> "It is proper to suggest further that the statute does not specify what shall constitute a waiver, leaving

that to be determined by the general rules of evidence, which, without statutory authority, had previously been recognized as applicable to communications between client and attorney."

On cross examination the plaintiff testified:

"Q. What day was it he put this strong medicine in your eye, the first day or some day later? A. He says he treated him for some days with some black medicine that he put in my eye, and on one of those days he went over there and he dipped a little piece of stick and a little cotton on the end of that stick and he put it into a bottle, and when he come out with it it was smoking, and then he put it in my eye, it burned like everything. It was pretty strong for my eye." (Transcript pp. 48-49.)

It cannot be claimed that plaintiff waived the privilege by testifying on cross examination, for it is essentially not voluntary.

In case of *Burgess v. Sims Drug Co.*, 86 N. W. 309, the court said:

"If counsel saw fit on cross examination to inquire into this matter, he must be found by the answer, and cannot afterwards claim that the witness, by answering without objection, voluntarily waived the privilege."

To same effect, that matters brought out on cross examination do not waive the privilege, see

Hirschberg v. Southern Pac. Co., 183 Pac. 144, 2d column (Cal.).

Plaintiff did not testify to any communication whatever between him and his physicians; those were new matters, not brought out on direct examination of the plaintiff and which the defendant had not the right to go into on cross examination.

Defendant has several thousand employees, and has many doctors in its employ. It selects the physicians and a certain sum is taken out of the pay check of each employee

each month, which is used to pay salaries of doctors and hospital upkeep.

> "Confidential communications by a patient to a physician are not less privileged because the relation is established at the request of a third person."
>
> *Union Pac. R. Co. v. Thomas,* 152 Fed. 367, C. C. A.

Privileged communication—question for the court:

> "Whether or not the circumstances are such as to make the rule or privilege applicable in a particular case is a question for the court."
>
> 23 Am. & Eng. Ency. Law, 2nd Ed. 71;
> 40 Cyc. 239;
> Potter's Dwarris on Statutes, p. [illegible]

Upon a conflict of evidence, whether such relation does or does not exist, the decision of the trial judge must be deemed conclusive.

> *Harris v. Daugherty,* 11 S. W. (Tex.) 923, first column;
> *In re Myer's Estate,* 10 Pac. (Cal.) 711;
> *Childs v. Merrill,* 66 Vt. 434, 29 Atl. 532;
> *State v. Louani,* 79 Vt. 463, 65 Atl. 532, 9 Ann. Case 194;
> *Hughes v. Boone,* 102 N. Car. 137, 9 S. E. 286;
> *People v. Atkinson,* 40 Cal. 284;
> *Arizona & N. M. Ry. Co. v. Clark,* 207 Fed. 821;
> *Ariz. Cop. Co. v. Burciago,* 20 Ariz. 85, 177 pp. 30-31, para. 1.

In case of *Arizona & N. M. Ry. Co. v. Clark,* 235 U. S. 669, 59 L. Ed. 415, we are furnished a construction of the Arizona statute under consideration, and in which the court states that the Arizona statute is different from the statutes of other states and that the decisions on other statutes are "valueless as guides to the meaning of the statute here in question (Arizona), but the very fact that the legislature of Arizona departed from the form of the New York statute indicates that it did so because it had a different purpose to express."

Again in this case the court said:

> "And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies *with reference to such communications.*
>
> It contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent.
>
> In order to prevent the patient from being subjected to this disadvantage, the act gives him the option of excluding *the physician's evidence entirely by himself refraining from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment.*" (Italics ours.)

Recently this identical question was passed upon by the Supreme Court of Arizona, case *Arizona Eastern R. Co. v. Matthews*, 180 Pac. 159, gist 164, in which the court holds that the ban of secrecy is not raised, nor privilege waived, so long as the patient does not voluntarily testify as to what he "told the physician with reference to his ailment," and that "the patient can object to the physician testifying as to what he may have learned in his professional capacity unless the patient has himself" testified to the communications he made to the physician. *"It not appearing that the appellee testified to any communications made by him to the physicians, he did not waive his right to object to their testifying."* (Italics ours.)

Even if the plaintiff did testify that he went to see Dr. Rice and that this doctor had treated him, and "put some kind of water in his eye that was too strong" (Tr. p. 43), he did not waive his privilege to object to the doctor's testimony, because he had not *"testified to any communications he made to this physician."*

The record in this case fails to show that plaintiff testified to any communications made by him to any of the physicians.

Under the Michigan statute on privileged communications, in case of *Slater v. Sorge*, 131 N. W. 565, the court

had the same proposition under consideration, in which it was shown that plaintiff in that case had testified in his own behalf:

> "I caught a car and came over to Dr. Taber's office in Benton Harbor. I showed him my hand and walked the floor and halls until he got to it. He treated the hand; put medicine on it. I went to Dr. Taber's again. He saw it the day of the injury and the next day and the following Sunday, three days in succession."

In this Michigan case, Dr. Taber was called as a witness by defendant. Plaintiff objected on ground of privileged relation. The defendant contended that because plaintiff had testified that he had showed Dr. Taber his hand that Dr. Taber had treated it and put medicine on it that plaintiff had waived the privilege, but the court held that there had been no waiver and refused to permit the doctor to testify.

In case *Indianapolis & M. Rapid Transit Co. v. Hall,* 76 N. E. 242 (Ind.), the court said:

> "The fact that the plaintiff had testified that she had sustained injuries, and that she called Dr. Herr and that he had prescribed for her back and side did not justify the admission of the evidence of the physician as to what he had or had not discovered as the result of an examination of the plaintiff's person."

When the Clark case was before this court, 207 Fed. 821, in construing the Arizona statute on privileged communications, this court said:

> "Such statutes are designed to protect the patient and should be liberally construed to that end."

The best construction of the Arizona statute on privileged communications is to be found in the Clark case only, in the 207 F. 821 and 235 U. S. 669, 59 L. Ed. 415, and *Ariz. E. R. Co. v. Matthews,* 180 P. 159.

Generally on the question of privileged communication:

"A physician sent by an officer of a defendant corporation in a personal injury case to examine the plaintiff, although for the purpose of obtaining evidence, and the patient believes that the doctor was called for the purpose of treating him and submits to an examination under such belief, the knowledge and information so obtained is privileged."

Munz v. Salt Lake City Ry. Co., 70 P. (Utah) 852;
1 Elliott on Evidence, p. 741, Sec. 634;
Underhill on Crim. Evi., 2nd Ed., Sec. 179.

"Information obtained by trick, deception, misrepresentation, or any other means whereby the patient is made to believe that the examination is made for his benefit, the information so obtained is privileged."

The People v. Ira Stout, Parker's Criminal Reports (N. Y.), Vol. 3, pp. 670, 675; affirmed in *People v. Austin,* 93 N. E. 59.

"A physician called in by an attending physician or by friends, or by strangers, and who makes an examination of the patient or learns from the patient the nature of his injuries, such knowledge and information are privileged and the physician cannot give testimony of the same."

Reinhan v. Dennin, 9 N. E. (N. Y.) 320, 322;
Union Pac. R. Co. v. Thomas, 152 Fed. 365;
People v. Murphy, 4 N. E. 326.

"If a physician attends a person under circumstances calculated to produce the impression that he does so professionally, and his visit is so regarded and acted upon by the person, it is enough to establish the relation.

These statutes are designed to protect the patient, not the physician, and, being remedial in their nature,

ought to receive a liberal construction which will fully effectuate their wise and humane provisions."

Underhill on Crim. Evi., 2nd Ed., Sec. 179, p. 341; *Freel v. Market St. Cable Ry. Co.,* 97 Cal. 40; 23 Ency. L., 2nd Ed., pp. 84, 85.

Under assignment IX it is claimed the court erred in refusing to give appellant's requested instruction, which in effect singled out a particular fact and asked the court to tell the jury that because the plaintiff on objection had excluded the testimony of defendant's physician, who had treated him, on the ground that such testimony was privileged, was a fact to be considered by the jury in weighing the plaintiff's testimony and in judging of the truth of the story he told. This matter was fully covered in the court's general charge to the jury. (Transcript pp. 121-122.)

It is held in case of *Wood v. Los Angeles Trac. Co.,* 1 Cal. App. 474, 82 Pac. 547, that it is not error to refuse to give such cautionary instructions, because they lead the jury to infer that the court has a poor opinion of such evidence and that such charges deal with the weight of the evidence—matters for the jury to determine.

This court in construing this statute in case *Arizona & N. M. R. Co. v. Clark,* 207 Fed. 821, said:

"Such statutes are designed to protect the patient and should be liberally construed to that end."

To sustain the contention of the appellant that such instruction should have been given would amount to little less than a repeal of the statute. "To claim the protection of this statute is the legal right of a patient of no less inviolability than any other personal right, and it is wholly inconsistent with that right to say that its exercise in a judicial proceeding shall be allowed to prejudice the cause of him who claims it." Such cautionary instructions should not be given, nor should the counsel be permitted to make unfavorable comments to the jury on the failure of the plaintiff to call such witnesses.

Brackney v. Fogle, 156 Ind. 533-5, 60 N. E. 303.

Counsel have no right to ask the witness if he is willing that physician who treated him testify in the case. Such questions are prejudicial error, nor has counsel the right to argue to the jury the fact that plaintiff refused such consent.

McConnell v. City of Osage, 80 Iowa 293, N. W. 550;

William Laurie v. McCullough, 90 N. E. (Ind.) 1014, 1017;

Burgess v. Sims Drug Co., 114 Iowa 275, 86 N. W. 309, 2nd column, 22 C. J. 125, Sec. 59, states the rule:

> "The more generally accepted view is that no unfavorable inference arises from a party's failure to produce, or refusal to consent to the admission of, testimony of a witness as to privileged communications between himself and such party."

It is generally held that a party may take advantage of a communication as privileged and object to testimony in regard thereto without any unfavorable presumptions or inference arising against him.

Graves v. United States, 150 U. S. 118, 37 L. Ed. 1021;

Pennsylvania R. Co. v. Durkee, 147 Fed. 99, 78 C. C. A. 107, 8 Ann. Cas. 790;

William Laurie v. McCullough, 90 N. E. (Ind.) 1014;

Cook v. Los Angeles, 169 Cal. 113, 145 p. 1013;

Nat. German-American Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016;

Johnson v. State, 63 Miss. 313;

Arnold v. Maryville, 110 Mo. A. 254, 85 S. W. 107;

Lane v. Spokane Falls, 21 Wash. 119, 57 p. 367, 75 Am. S. R. 821, 46 L. R. A. 153;

Eng.-Wentworth v. Lloyd, 10 H. L. Cas. 589, 11 Reprint 1154;

Rump v. Woods, 50 Ind. A. 347, 98 N. E. 369.

Some reasons for the rule are given in *Johnson v State,* 63 Miss. 313.

INTEREST ON JUDGMENT.

Paragraph 3161, Chap. VI, Title 14, Revised Statutes of Arizona, Civil Code, 1913, is as follows:

> 3161. "In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful, and the judgment of the lower court be sustained by the higher court or courts, then, and in that event, the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

The printed transcript in this case, page 6, shows that the complaint was filed in the lower court on June 19, 1919. The amount of the judgment in this case is $2,793.05, and in case this judgment is affirmed, we request this court to add twelve per cent interest thereon from June 19, 1919, until paid.

This provision of the Arizona statute has had the consideration of the Supreme Court of the United States and held valid.

> *Arizona Copper Co. v. Hammer,* 250 U. S. 434, 63 L. Ed. 1072, 2nd column.

Respectfully submitted,

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